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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

MOHAMMED K. GHODS,

Plaintiff and Appellant,

v.

CITICORP VENDOR FINANCE, INC.,

Defendant and Respondent.

G041438

(Super. Ct. No. 07CC06336)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Jamoa A. Moberly, Judge. Affirmed.

Ghods Law Firm, Bailey Law Group, Mohammed K. Ghods and William A. Stahr for Plaintiff and Appellant.

TroyGould, Russ M. Fukano, Kenneth J. MacArthur and Christopher A. Lilly for Defendant and Respondent.

Mohammed K. Ghods, an attorney, filed a lawsuit seeking \$250,000 in damages arising from a broken photocopier. He sued the leasing company, Citicorp Vender Finance, Inc. (Citicorp) and the copier dealer, Select Office Solutions, Inc., (Select). The trial court entered a judgment of dismissal in favor of Citicorp after sustaining its demurrer to Ghods's third amended complaint (TAC) without leave to amend. On appeal, Ghods claims this was error because he alleged facts sufficient to support his claims, or the court should have given him leave to amend to correct any perceived deficiencies or uncertainties. We conclude the trial court gave Ghods ample opportunity to remedy the defects in his complaint, and the demurrer was properly sustained without leave to amend. The judgment dismissing the case against Citicorp is affirmed.

I

In December 2001, Ghods leased a photocopier for his law office. He negotiated a deal with Select's employee, Demitri Karidis. Ghods signed two forms. The first entitled "Machine Order Form" was signed by Ghods and Karidis. On the form Karidis handwrote a description of the photocopier and supporting equipment. He also wrote the order included "service calls, toner, parts, labor, drums . . . etc. everything but paper and staples." The order form contained a small box at the bottom entitled "LEASE OPTION." Ghods alleged Karidis wrote the name Citicorp as the name of the leasing company, a lease term of 60 months, and a monthly amount of \$720.84.

The same day, Ghods signed a standardized form entitled "Cost Per Copy Rental Agreement" (the CPC Agreement). The CPC Agreement identified Select as the "Supplier," Ghods as the "User," and Citicorp as the "Owner." The two-page contract contained signature lines for Ghods and Citicorp but not Select. The CPC Agreement stated it was a rental agreement between Citicorp (the owner of the copier) and Ghods (the user of the copier). The "initial term of agreement" was 60 months during which time Ghods agreed to pay a minimum monthly amount or .060007 per copy, whichever

was higher. The rental rate terms, and an option to increase the rate each year, were described in the second paragraph of the Agreement's first page.

The third paragraph of the CPC Agreement, under the section "USE AND MAINTENANCE: NO WARRANTIES" stated the equipment was rented "AS IS." Citicorp specified it was the owner, not the supplier, dealer, or manufacturer of the equipment being rented. It stated Ghods "ha[d] entered into a separate agreement with the dealer or Equipment manufacturer for supplies and maintenance for the Equipment, which is not part of this Rental Agreement. WE EXPRESSLY DISCLAIM ALL WARRANTIES, EXPRESSED OR IMPLIED, AS TO ANY MATTER WHATSOEVER"

The second page of the CPC Agreement contained other terms regarding the lease, including an integration clause specifying, "This Agreement constitutes the entire agreement between the parties, superseding all previous proposals, oral or written. No representation or statement not contained on the original of this Agreement shall be binding as a warranty or otherwise, nor shall this Agreement be modified or amended except in writing signed by us and by you. You expressly disclaim having relied upon any representation or statement concerning the capability, condition, operation, performance or specifications of the Equipment except to the extent set forth on the original of this Agreement."

The final clause of the agreement stated, "CUSTOMER P.O.: You agree that any Purchase Order issued to us covering the rental of this Equipment is issued for purposes of authorization and your internal use only, and none of its terms and conditions shall modify the terms and conditions of this Agreement."

Ghods alleged Select serviced and maintained the copier for two years and then stopped. Citicorp refused to service or repair the copier claiming it was not part of its lease agreement. The copier became useless, but Ghods continued to make the lease payments for the remaining three years of the initial lease term. Citicorp raised the

monthly lease amount by 10 percent each year, as permitted by the express terms of the CPC Agreement.

In June 2006, Citicorp advised Ghods the initial term of the lease was scheduled to expire and would be automatically extended unless Ghods timely sent notice as described in the CPC Agreement. Ghods alleged he wrote a letter to Citicorp stating he did not wish to renew. He claimed Citicorp ignored the letter and it sent more invoices requesting payment on the renewed lease.

In May 2007, Ghods filed his initial complaint alleging four causes of action: (1) breach of the CPC Agreement; (2) accounting; (3) fraud; and (4) unjust enrichment. He alleged Select and Citicorp “breached their obligations to repair and maintain the copier as agreed, made promises without intent to perform, concealed their true intentions regarding who was responsible for maintenance and supply of the copier, have extracted over \$30,000 dollars for an inoperable copier and have caused substantial losses to [Ghods] by their negligent, fraudulent and otherwise wrongful conduct.”

Citicorp demurred to the complaint, arguing Ghods had brought the action “to escape the benefit of his bargain. [He] executed an integrated lease agreement with Citicorp and his entire complaint hinges upon a central theme: obligations allegedly discussed during negotiation, but not part of the final, integrated writing, were not performed.” Citicorp argued Ghods was seeking damages “pursuant to a contract that was never breached, an accounting where there is no fiduciary, and recovery for ‘unjust’ enrichment where there is no basis for restitution in either quasi-contract or constructive trust.”

The trial court overruled the demurrer with respect to Ghods’s causes of action for breach of contract and unjust enrichment. It sustained with leave to amend the demurrer to the second cause of action requesting an accounting. The court reasoned the accounting claim related only to the alleged fraudulent actions of codefendant Select, not Citicorp.

In January 2008, Ghods filed a first amended complaint (FAC) alleging seven causes of action: (1) breach of contract and covenant of good faith and fair dealing; (2) accounting; (3) fraud and deceit; (4) unjust enrichment; (5) inducing breach of contract; (6) intentional interference with prospective economic advantage; and (7) declaratory relief and punitive damages. Citicorp filed a demurrer and motion to strike, and Ghods filed oppositions.

The court sustained the demurrer as to all the causes of action with leave to amend. It gave the following reasons in its minute order. As to the first cause of action, Ghods added “[n]umerous conflicting factual allegations If [Ghods] seeks to allege alternative theories, this should be done as separate causes of action.” It ruled the second cause of action for accounting was based on the fraud claim which was defective. It explained fraud must be pled with more specificity. The unjust enrichment claim failed for uncertainty, and also because it was based upon the same defective allegations raised in the first, fifth, sixth, and seventh causes of action. The court added Ghods needed to plead “an unambiguous contract or relationship between the parties.”

In May 2008, Ghods filed a second amended complaint (SAC) stating the first and second causes of action were for breach of contract and the covenant of good faith and fair dealing. The other claims remained the same but were renumbered. In its demurrer, Citicorp asserted Ghods no longer disputed the terms of the lease barred his claims, but in an attempt to keep his contract claim alive he pled two alternative contract claims. In one claim, Ghods admitted the CPC Agreement was valid, but parts of it were unenforceable. In the alternative claim, Ghods alleged the CPC Agreement was invalid because he never received a copy of the agreement executed by Citicorp. Citicorp argued Ghods had failed to fix the uncertainty and ambiguity problems noted previously by the trial court regarding the remaining causes of action. For example, with respect to the fraud claim, Ghods failed to plead the facts necessary to show the salesperson employed with Select had authority to speak on behalf of Citicorp. Ghods filed an opposition.

The court agreed with Citicorp. It sustained the demurrer with leave to amend the first and second causes of action (both breach of contract), the fourth cause of action for fraud, the fifth cause of action for unjust enrichment, and the eighth cause of action for declaratory relief. It advised Ghods, “By incorporating the preamble 32 paragraphs into each separate cause of action and the exhibits referred to therein, [Ghods] has rendered the causes of action fatally uncertain. It is unclear which document(s) [Ghods] contends is the contract with [Citicorp,] although exhibit D (Rental Agreement) appears to be a fully integrated agreement. As to the fraud [cause of action], it is uncertain as to [Citicorp]. Fraud must be pled with specificity.”

In addition, the court sustained the demurrer *without* leave to amend as to the third cause of action (accounting), the sixth cause of action (inducing breach of contract), and the seventh cause of action (intentional interference with prospective economic advantage). The court reasoned, “A specific sum has been identified by [Ghods. Citicorp] is a party to the contract and none of the parties are strangers thereby defeating the [seventh cause of action].”

In July 2008, Ghods filed his TAC alleging all the same claims except for (1) inducing breach of contract and (2) intentional interference with prospective economic advantage. Citicorp again demurred and argued the complaint had not been remedied by the amendments, and the accounting claim had already been dismissed by the court. Ghods filed an opposition.

The court sustained the TAC without leave to amend. In the minute order it ruled, “The entire [TAC] is fatally uncertain because [Ghods] incorporates paragraphs 13 and 14 and the conflicting paragraph [15] into each of the causes of action at paragraphs 31, 37, 45, 48, 66, and 71. Citicorp is not a party to the Machine Order Form. The CPC Agreement is an integrated agreement which [Ghods] ratified and [it] specifically states Citicorp is not responsible for service. The [third cause of action] for accounting is improper since the demurrer was previously sustained to that [claim] without leave. The

fraud allegations are fatally uncertain and [Ghods] has not pled facts to show ratification even if the specific allegations were adequate. The [fifth and sixth causes of action] fail due to the failure of the contract claims.” Judgment was entered in favor of Citicorp.

Thereafter, Citicorp moved for attorney fees and costs. Before the motion was heard, Ghods filed a notice of appeal on January 6, 2009, regarding the judgment of dismissal. In April 2009, Ghods and Citicorp filed a stipulation with this court requesting appellate review of a February 2009 postjudgment order for attorney fees and costs (awarded after the notice of appeal was filed). They requested permission to augment the record to include the proceedings relating to the postjudgment attorney fees award. This court granted the request to augment but did not accept the portion of the stipulation expanding the scope of review on appeal to include the postjudgment award. In our order, we invited the parties to submit letter briefs addressing this court’s jurisdiction to consider the attorney fees award, and we ordered the issue would be considered in conjunction with the decision on appeal. In response, Ghods filed a letter brief, and Citicorp did not.

II

“When reviewing a judgment dismissing a complaint after the granting of a demurrer without leave to amend, courts must assume the truth of the complaint’s properly pleaded or implied factual allegations. Courts must also consider judicially noticed matters. In addition, we give the complaint a reasonable interpretation, and read it in context. If the trial court has sustained the demurer, we determine whether the complaint states facts sufficient to state a cause of action. If the court sustained the demurrer without leave to amend, as here, we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. If we find that an amendment could cure the defect, we conclude that the trial court abused its discretion and we reverse; if not, no abuse of discretion has occurred. The plaintiff has the burden

of proving that an amendment would cure the defect.” (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081, citations omitted.)

Ghods asserts the trial court incorrectly made several factual findings. However, this kind of error is beyond the scope of our review. Applying the standard articulated above, we have assumed the truth of the complaint’s facts and, as will be explained below, we independently conclude the trial court properly sustained the demurrer. We reviewed the trial court’s ruling only to the extent necessary to determine if it was an abuse of discretion to deny Ghods’s leave to amend. It was undisputed Ghods was given two opportunities to cure the defects in his complaint, and we find there is no reason to believe another chance is warranted in this case. “The basic principle governing the privilege of amendment is clear enough: amending of the pleading should be allowed if it appears likely the pleader has, and can state, a recognizable legal claim; amendment should be denied if it appears the pleader has only a moral claim or disappointed expectation, and cannot validly state a justiciable cause of action. But in application we find more of art than of science. How does a court, confronted with a defective pleading of nondescript appearance and uncertain ancestry, determine whether the pleading is susceptible of future domestication into the recognizable flock of justiciable causes of action? In final analysis, the court is required to look at the existing pleading and hazard its best judgment whether behind the words of the pleading anything of legal substance lies, whether on further revision the pleading can honestly state a cause of action.” (*Hills Trans. Co. v. Southwest Forest Industries, Inc.* (1968) 266 Cal.App.2d 702, 709.) Based on this record, it cannot be said the trial court abused its discretion in concluding further revision will not “honestly state a cause of action.” (*Ibid.*)

The Complaint was Uncertain.

On appeal, Ghods asserted the first cause of action was based on breach of the Machine Order Form. He argues the dealer’s order form was in essence Citicorp’s

lease and whatever terms were lacking could reasonably be supplemented by the California Uniform Commercial Code. Recognizing the CPC Agreement was also attached to the complaint, Ghods maintained it must be disregarded as an invalid contract due to evidence Citicorp failed to execute or accept it.

The second cause of action was an alternative breach of contract theory. On appeal, Ghods stated the claim was based on the argument two writings merged to comprise the lease agreement (the Machine Order Form and the CPC Agreement). To the extent the two writings conflicted, he maintained the CPC Agreement's terms must be ignored as being unreasonable and unconscionable.

As factual support for the first cause of action, Ghods incorporated by reference the introductory allegations contained in paragraphs 1 through 15 and paragraphs 17 through 22. For the second cause of action, all the introductory paragraphs (paragraphs 1 through 31) were incorporated by reference. In sustaining the demurrer, the trial court concluded both breach of contract claims were factually uncertain because introductory paragraphs 13 through 15 contained contradictory facts creating uncertainty as to the contracts forming the basis for the alternative claims.

We agree with the trial court's conclusion the contradictory paragraphs rendered the TAC complaint uncertain. In short, paragraphs 13 and 14 alleged the Machine Order Form constituted the parties' lease, and paragraph 15 stated the lease was a merger of both the Machine Order Form and the CPC Agreement. Together these factual allegations rendered each claim unintelligible. As mentioned above, Ghods claimed the first cause of action was based solely on the alleged breach of the Machine Order Form. Thus, Ghods's incorporation of paragraph 15 (stating a different combination of contracts controlled) made the action confusing and uncertain. Similarly, insertion of paragraphs 13 and 14 stating the Machine Order Form is the sole controlling lease renders the second cause of action for breach of the CPC Agreement uncertain. The demurrer was properly sustained on this basis.

We recognize a demurrer for uncertainty is strictly construed because most ambiguities can be clarified through discovery or stipulations. (Weil & Brown Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2009) ¶ 7:85, p. 7(1)-37.) Courts have determined demurrers for uncertainty should be sustained only where the complaint is so awful the defendant cannot reasonably respond. In other words, it is not enough to unclearly identify parties or claims, or to create confusion as to an inconsequential matter. (See *Khoury v. Maly's of California, Inc.* (1993) 14 Cal.App.4th 612, 616; *Williams v. Beechnut Nutrition Corp.* (1986) 185 Cal.App.3d 135, 139.) The court must find the defendant “cannot reasonably determine what issues must be admitted or denied.” (Weil & Brown Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2009) ¶ 7:85, p. 7(1)-37.) Such is the case here. The factual allegations concerning what contract is the basis of the claims is so convoluted and contradictory that Citicorp would not reasonably determine what must be admitted or denied. In addition, we agree with the trial court’s conclusion the contradictory and confusing allegations tainted the other causes of action as well. The contradictory paragraphs 13 through 15 were also incorporated by reference into the third through sixth causes of action.

Additional leave to amend to cure the defect was not warranted in this case. The same contradictory and confusing allegations were contained in the SAC (numbered in paragraphs 12 through 15) and the FAC (paragraphs 7 through 10). The trial court previously ruled the complaint was uncertain and thus Ghods had adequate notice the amended complaint was unintelligible. There is no reason to believe a fourth attempt would remedy the situation.

The trial court articulated other reasons the demurrer should be sustained, but in light of our ruling the TAC fails due to uncertainty, we need not engage in any further in-depth analysis of the additional grounds.

III

We need not consider Ghods's argument concerning Citicorp's entitlement to attorney fees as the prevailing party in this case. Assuming we had the discretion and jurisdiction to consider the postjudgment order, the claim was rendered moot based on our ruling the judgment of dismissal was correct and should be affirmed.

IV

The judgment is affirmed. The parties' request to have this court consider the postjudgment attorney fees award is denied as moot. Citicorp shall recover its costs on appeal.

O'LEARY, J.

WE CONCUR:

SILLS, P. J.

MOORE, J.